

British Association of Journalists



COPYRIGHT GUIDE

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BAJ'S INTELLECTUAL
PROPERTY SOLICITOR

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Aim of Copyright Guide

In the age of the rapid advances in electronic media, journalists have a vital need to protect their rights. The Guide has been written to provide an accessible starting place for information on the subject of copyright and to address the most common copyright problems which journalists face day to day.

The Guide is written according to the English law at the time of publication which is the Copyright, Designs and Patents Act 1988 as amended by the Copyright and Related Rights Regulations 2003 (SI 2003/2498) and other subsequent Regulations referred to. Consideration is also given to the Digital Economy Act 2010 and recent case law.

Definition of Copyright

“Copyright is a property right”¹ which means that it has an economic value and can be legally dealt with, for example, it can be sold, licensed, mortgaged and inherited. Because it is an intangible right it is referred to as an “intellectual property right”. (The other intellectual property rights are defined in Appendix A).

Copyright protects the expression of ideas not the idea itself.² It is a right which arises automatically as soon as the work which it protects comes into existence. It protects the following descriptions of works:

- Original literary, artistic, dramatic or musical works.
- Sound recordings, films or broadcasts.
- The typographical arrangement of published editions.

The important point to note is that the item for which copyright protection is claimed must be recorded in some tangible form, e.g., on paper, on celluloid film or canvas or in bronze or clay etc. A journalist's work will principally be protected by copyright as a literary work in the text and as an artistic work in the photographs.

The terms **literary** and **artistic** cover a broad range of work.

Literary means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes:

- A table or compilation, or database.
- A computer program.³

These examples are intended to show that a work does not have to be literary in

¹ Section 1(1) of the Copyright, Designs and Patents Act 1988

² Ideas will most likely be protected as “confidential information”, see page 6 and Appendix A

³ Section 3(1) of the 1988 Act.

Duration of Copyright

To comply with an EU Directive on the term of copyright in the UK, the length of protection of copyright works has been extended to 70 years⁷ from the end of the year in which the author died (as opposed to 50 years). As a result, the works of some authors who died over 50 years ago and were out of copyright have come back into copyright e.g., Thomas Hardy, James Joyce and D.H. Lawrence. If a work is anonymous the term is 70 years from the end of the calendar year in which the work was made or, if the work was made available in the European Economic Area, from the end of the calendar year in which it was first made.

Selling and Licensing

Assignments

An assignment is a sale of copyright. The owner of copyright can assign the copyright in whole or in part. The golden rule is that **an assignment must be made in writing and signed by or on behalf of the owner.**⁸ An oral or unsigned assignment could be treated as an agreement to assign. The effectiveness of the agreement would be a matter of contract law. The courts would consider the intentions of the parties and the circumstances of the case.

An assignment can be made of future copyright works and this would be effective as soon as the work came into existence.

Licences

A licence does not transfer any part of the ownership but gives someone else permission to deal with the work in a way which would otherwise be an infringement. A licence can be exclusive or non-exclusive. A non-exclusive licence means that the owner of the copyright can licence more than one person to use it and this includes himself. An exclusive licence means that only the assignee is permitted to use the copyright to the exclusion of all others including the copyright owner himself. Only an exclusive licence needs to be in writing and signed by the person granting the licence. However, it is advisable to put all licences in writing.

If nothing is in writing, a licence can be implied from the conduct of the parties or out of a contractual relationship. In the case of freelance journalists where their work is commissioned there is usually an implied licence for the commissioner (that is, the publisher) to publish the work for the purpose for which the commission was made, namely publishing in the newspaper or magazine. The journalist then has copyright in other uses. The act of commissioning does not procure the copyright for the commissioner. Crown Copyright is a phrase still used by

⁷ This is an extension to the previous term of 50 years. The UK legislation is contained in the EU Copyright Term Directive 93/98 (OJ 1993 L290/9) which came into force on 1st January 1996.

⁸ Section 90(3) of the 1988 Act

Government Departments, but the Crown is in no different position from any other publisher.

Publishers' proposed new Freelance Contracts

Because of the increasing use of electronic publishing, publishers have tried to issue new standard contracts to their freelancers in order to acquire additional rights. As a result, the contracts tend to favour the interests of the publisher over the journalist.

The language of the "new" contract may refer to the publisher owning the copyright from the outset e.g. in return for the fee or may merely state that copyright belongs to the publisher. It may say that the journalist need not reply to the "new" contract or if none is received the new terms will be deemed accepted.

This wording is not effective to transfer copyright. Statute clearly states that a transfer of copyright from the original author or photographer is only effective if it is made in writing and signed by or on behalf of the assignor.

However, although statute says that you cannot lose your copyright unless you stipulate in writing to that effect, there is a possibility that by ignoring a publisher's purported "new" contract terms you could be silently agreeing. Further, the publisher could argue, for example, that in a conversation you made an oral assignment of your rights which the courts may treat as an agreement to assign and give retrospective effect to. **So always send a letter declining the new contract to cover yourself.**

The same principle applies to moral rights to which publishers may seek to apply new terms unilaterally. The basic rule is that moral rights do not apply to journalists, see Appendix C, but you should consider negotiating for some of the rights, for example, the right to be identified as the author, in your contract.

Sometimes publishers ask contributors to give warranties, for example, that they are the author of the work and that it does not infringe anyone's copyright. They may also seek indemnities should they face a claim resulting from breach of warranty. You should not agree to any warranty or indemnity because you could be exposed to severe financial penalties. Publishing companies have the resources to take out insurance cover and should be encouraged to do so.

Freelances' work put on the Internet

A freelance journalist who either takes photographs or writes copy will, as the author of the work he has created, own the copyright in that work. This rule is subject to any agreement he may have entered into, for example, with the newspaper which will use the work. Where a work is specifically commissioned by a publisher it is often the case that only a verbal agreement has been made or even if there is a written agreement, it will not mention the copyright. Nevertheless there is an implied, if not express, term that the publisher or person who

commissions the work has a licence to use the journalist's copyright for the purposes envisaged by the commission. Any reproduction of the work beyond the purposes of a commission is infringement of the journalist's copyright. The 1988 Act states that copying for which permission is required includes storing the work in any medium by electronic means. Thus, a work on a publisher's in-house database or on the Internet without permission from the copyright owner is unlawful.

There are two defences to this proposition which might be raised by a publisher. First, the publisher may say that the author has granted an express or implied licence to put the work on a database. This will depend on precisely what was discussed, if the matter was discussed at all. If the reproduction of the database does no more than reproduce the whole newspaper this could be said to be a compilation by the publisher acting within its licence to reproduce for publication. The reply to this would be that the publisher's licence is to reproduce for publication only in print and not electronically.

Where a database is compiled with some further input by the publisher into the arrangement of the database and is more than an electronic record of the original publication it would also be going beyond the ambit of the licence to publish in print.

The second defence is section 30 of the 1988 Act concerning **fair dealing** for the purpose of reporting current events. To succeed in this defence two requirements must be met:

- (a) The spirit of the section is aimed at providing a public interest defence in connection with the reporting of events which are current as opposed to historic.
- (b) The use of the copyright work must amount to "fair dealing". The reproduction of an entire work and the motive of the publisher in producing a database using others' efforts (without any payment for that specific use) and from which the publisher would benefit commercially indicates a lack of "fair dealing".

The answer to this problem is for freelance journalists to make it clear when negotiating with publishers that they own the copyright and that they are permitting use of their work solely for the paper or magazine. They must state that if the publisher wishes to make additional use of the work they should seek permission in advance and reward the journalist appropriately.

Submission of Ideas

Whenever a journalist has a new proposal for a story or, for example, a synopsis for an investigation which he wishes to suggest to a publisher the most important thing to consider is **confidentiality**. This can give protection if certain precautions are taken:

- You must make it clear before you disclose the idea that it is confidential. If your proposal is written to a newspaper or magazine ensure that you print the words "private and confidential" on each page.
- You should tell **in writing** the person to whom you put your idea that they must treat it as confidential and **must not** make any use of it without your consent. See Trade Secrets and Confidential Information in Appendix A.

Infringement of Copyright

If any of the rights of the copyright owner are carried out without the owner's permission then the copyright will have been infringed. In its simplest form this means that if a pirate copy of an article, photograph or book is made the copyright will have been infringed. The Act goes one stage further than this in defining copying in the context of infringement. Section 17(2) states that copying in relation to literary, artistic, dramatic or musical work means

"reproducing the work in any material form. This includes storing the work in any medium by electronic means."

In other words, copyright infringement is not just limited to the making of photocopies. Therefore, the reproduction and transmission of a copyright work on the Internet or other electronic media without the permission of the copyright owner amounts to an infringement of copyright.

Where only parts of the copyright work appear to have been copied there will be an infringement if a **substantial part** has been copied. This key phrase, however, is not defined in the 1988 Act but it has been analysed closely by the courts who apply a subjective test in deciding whether a substantial part of a copyright work has been copied. It is said that this is a question of quality not quantity.

Some of the ways of determining whether copying has taken place are to look at the amount taken, whether selected parts have been taken and if they are the essential parts, for example, the conclusion or summary, and if the same mistakes have crept into the copy. It is harder to decide if copyright has been infringed where the new work is not an identical copy but draws heavily on the earlier work. Appendix D contains a more in-depth look at infringement.

Remedies for Infringement of Copyright

The Act states that where copyright has been infringed⁹

"all such relief by way of damages, injunctions, accounts or otherwise is available to the Plaintiff as is available in respect of any other property right."

⁹ Section 96 of the 1988 Act

Damages

The general principle governing awards of damages in breach of copyright cases is that damages are compensatory and intended to put the Claimant in the position he would have been in had the infringement not occurred. This can be quantified easily in some cases, for example, if lost sales can be ascertained as a result of the infringement then that value of those sales will be the level of damages. For journalists whose work is reproduced in a particular medium without permission damages may be the fee which would have been charged had permission been sought, i.e. the licence fee.

Where there has been flagrant infringement the courts may award additional damages. The courts will consider whether the Defendant has benefited from the infringement and how deliberate the act was. Such damages will be rarely awarded.

Account of Profits

When going to court claiming infringement the Claimant will usually claim in the alternative damages or an account of profits. In some cases the profit made by the infringer exceeds the loss the plaintiff has suffered. In reality, once the Plaintiff wins his case he will seek damages because to opt for an account of profits will involve another prolonged court hearing.

Injunctions

An injunction is an order restraining the Defendant from carrying out the infringement. Frequently, interim injunctions (sometimes called interlocutory injunctions) are sought in which the court will be asked to restrain the Defendant's action pending the full trial of the case. At the interim stage the court will not examine in detail the merits of the case and the evidence before the court will be written material. It does not hear oral evidence and so there is no opportunity for cross examination of witnesses. Interim injunctions will generally only be granted if the "balance of convenience" favours the applicant. In other words, the person seeking the injunction must demonstrate that he will suffer more if the injunction is refused pending trial than the alleged perpetrator of the infringement will suffer if the injunction is granted.

Delivery Up

It is possible to obtain a court order that pirate copies or articles specifically made for producing the pirate copies be delivered to the Plaintiff for destruction.

When Copying is Permitted

There are some permitted acts which qualify or provide exceptions to what would otherwise be an infringement of copyright. New provisions relating to permitted acts became law on 31st October 2003¹⁰. The main result of these has been to require people needing to use copyright material for commercial purposes to obtain a licence. Central to the permitted acts is the concept of "fair dealing". The following are permitted acts:

- Making temporary copies
- Fair dealing for the purposes of research or private study
- Fair dealing for the purposes of criticism, review and news reporting
- Incidental inclusion of works
- Making a single copy available for personal use (by the visually impaired)
- Certain educational uses
- Certain uses by libraries and archives
- Certain uses for the purposes of public administration

The term "fair dealing" is not defined in the 1988 Act (as amended), although a number of factors have been considered relevant to determine fairness. Three of particular importance are:

- The number and extent of the extracts used
- The use made of them
- The proportion the extracts bear to the new work

In the case of news reporting, the decision in *Hyde Park Residence*¹¹ identified three principles:

- The motive of the infringer
- The extent and purpose of the use
- Whether the extent and purpose was necessary to report current events.

News Reporting¹²

Fair dealing with a copyright work for the purpose of reporting current events does not infringe copyright provided it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public. The facts reported in the article can be used by another person without infringing copyright to produce his or her own copyright work. However, it is the expression of the facts, that is, the form of words and the quotes used in the first article which are protected by copyright. These may be used for reporting current events provided it is fair dealing and so long as they are accompanied by a sufficient acknowledgement. For example, the acknowledgement should state the source of the material and the author and/or publication in which it originally appeared.

¹⁰ The Copyright and Related Rights Regulations 2003, SI 2003 2498

¹¹ *Hyde Park Residence Ltd v Yelland* [2000] 3WLR 215 CA

¹² Section 30(2) of the 1988 Act

No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or communication to the public where this would be impossible for reasons of practicality or otherwise.

This defence does not apply to photographs.

Notes and Recordings of Spoken Words

Where a speech is given and recorded on tape and not in writing the speaker and the maker of the tape own different copyrights: literary copyright and copyright in the sound recording respectively. Therefore, copyright in the sound recording would not be infringed by someone who took the words from the recording and printed them, for example, in a newspaper since a sound recording copyright is not infringed in that way.

The protection afforded to the reporter is based on his report as a literary work (based on his efforts in attending the speech or in transcribing the tape) rather than any copyright in the sound recording. The Act deliberately leaves open the question of a reporter's copyright to allow the courts to expand on the principle that where sufficient effort has been employed to obtain the report, for example, by the use of shorthand, the reporter should be given his own copyright as a literary work which he can assert against competitors who may otherwise seek to exploit his efforts.¹³

Further, it is not an infringement of copyright to use a record of spoken words for the purpose of **reporting current events**, or of communicating to the public the whole or part of the work provided certain conditions are fulfilled, namely that:

- The record is a direct record of the spoken word and is not taken from a previous record or from a broadcast or cable programme.
- The making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe copyright.
- The use made of the record or material taken from it is not of a kind prohibited by or on behalf of the speaker or copyright owner before the record was made.
- The use is by or with the authority of a person who is lawfully in possession of the record.¹⁴

The most important of the conditions are that neither the making of the record nor its subsequent use was prohibited by the speaker in advance.

Many interviews reported in newspapers will be eligible for exemption under the fair dealings provisions anyway but this part of the Act avoids the need for an acknowledgement.

¹³ See the case of *Walter -v- Lane* [1900] AC 539. Here Lord Rosebery's speeches were taken down by Times reporters in shorthand. The current statute was different to the 1988 Act but it was held that the newspaper was entitled to restrain the publication of copies of its reports.

¹⁴ Section 58 of the 1988 Act

It is important to note that even though the above defences may be available and successfully relied upon, the act of copying may still be in breach of contract or in breach of an agreement of confidentiality made between, for example, the interviewer and the interviewee.

There are other exceptions to infringement relating to education, libraries, video and sound recordings which are beyond the scope of this Guide.

Criticism or Review¹⁵

Fair dealing is permitted for these purposes for all categories of copyright work provided it is accompanied by a sufficient acknowledgement **and** provided the work has been made available to the public. A biographer will now need to obtain a licence before using unpublished letters etc, in order to rely on this exception.

A photograph can be reproduced for this purpose. However, the reproduction of stills taken from a film and printed as if they are photographs in order to report a current event may be fair dealing provided a sufficient acknowledgement is made.

Sufficient acknowledgement means an acknowledgement which identifies the work by title or other description unless, where the work is published, it is published anonymously, and for an unpublished work it is not possible for a person to ascertain the identity of the author by reasonable enquiry.

Research or Private Study

This has been updated by the 2003 Regulations. Section 29(1) of the 1988 Act as amended provides that the defence is available for research for **a non-commercial purpose** in respect of a literary, dramatic, musical and artistic work. Fair dealing with these works will **not** infringe copyright provided it is accompanied by a sufficient acknowledgement. However, no acknowledgement is required if this is impossible for reasons of practicality or otherwise.

Fair dealing in this type of work does not infringe copyright provided that private study is not directly or indirectly for commercial purposes. The Patent Office guidelines indicate that all research by businesses operating for profit are likely to be considered as being for a commercial purpose. Similarly, research by charities and other non-profit organisations will fall outside the exception if it is for a commercial purpose.

Making of Temporary Copies

The 2003 Regulations introduced this exception. It is not an infringement of copyright to make a temporary copy of a literary work (though not a database or computer programme) or a dramatic work, musical or artistic work or a typographical arrangement, sound recording or film. Making a temporary copy means a copy which is transient or incidental, which is an integral and essential

¹⁵ Section 30(1) of the 1988 Act

part of a technological process and the sole purpose of which is to enable:

- a) a transmission of the work in a network between third parties by an intermediary,
or
 - b) a lawful use of the work
- and which has no independent economic significance.

Photography in the Digital Age

Photo Tampering

Advances in technology enable anyone with digital access to a photograph to modify and enhance it. Retouching which substantially changes rather than simply enhancing the image without the consent of the copyright owner may infringe his rights. Permission should be obtained in advance wherever possible.

Implied Consent to use Copyright

The case of Alan Grisbrook¹⁶, a top freelance photographer for many years, highlights the need for photographers to reflect on the licences they may have granted.

Mr Grisbrook supplied photos to the Daily Mirror, Sunday Mirror and The People between 1981 and 1997 but there was no written contract which governed the working relationship. MGN kept the photos, both published and unpublished, in its archive, as was the practice of other newspapers.

Mr Grisbrook was paid a fee if his photos were published and a further fee if they were used in a separate and subsequent edition of the paper. Mr Grisbrook kept ownership of the copyright.

In 1998 he discovered he had not been paid his licence fees for additional use of his photos under a licence agreement he had entered into with MGN and sued them. He also terminated the licence ending MGN's right to hold his photos in their archive. The case settled with a Consent Order in which MGN would remove Mr Grisbrook's photos from the archives, electronic and physical.

In 2008 Mr Grisbrook found out that MGN were selling his photos through their archive websites in breach of the Consent Order.

The case turned on the terms of the licence Mr Grisbrook had agreed with MGN. He argued that he only licensed MGN to use his photos for the production of current newspapers and the occasional future use of material stored in MGN's picture library (which eventually included a digital library) in new publications in return for further fees.

The judge applied the case law on implied licence: the licence granted will be only what is necessary to achieve what was in the joint contemplation of the parties at the date it was entered into and it cannot be extended by the court to allow parties to take advantage of new unexpected opportunities. Therefore the judge found that Mr Grisbrook did not give MGN permission to exploit his photos from their website because this had not been contemplated by either party at the time of the licence.

Whilst the case does not establish new law it gives pause for thought.

Recommendations resulting from it are:

- Put all agreements or licences you enter into in writing
- Regularly monitor the use to which your work is put

Where a freelance photographer has a licence with a publisher but the licence does not mention or give express permission to the publisher to allow a third party through subscriptions to use photos in back copies of the publication, there could be a claim for infringement of copyright and legal advice should be sought.

Postings on Social Networking Sites

Caution should be exercised before posting photographs on social networking sites. A case has arisen in New York where photos of the earthquake in Haiti were posted by Mr Morel on a Twitter account he opened in the first minutes after the disaster. The photos were picked up by AFP and circulated round the world. AFP contend that the terms of the Twitter licence gave them an unlimited right to use the photos anywhere in the world, which the photographer refutes, claiming substantial damages against AFP and Getty Images.

The law on copyright in this area is unclear. The safest course is to avoid posting photos in this way until there is clarity in the law – unless you do not wish to profit from them.

¹⁶ Grisbrook – v – MGN Limited and Others [2009] EWHC 2520 (Ch)

APPENDIX A

Glossary of Intellectual Property terms

Copyright protects the form in which ideas are expressed whether in artistic, literary, musical, dramatic or computer form. Copyright is governed by statute and, subject to exceptions, lasts for 70 years after the death of the author. Copyright is not a monopoly right, unlike patents and registered designs which are. Thus if it can be shown that two precisely similar works were produced independently of one another there can be no infringement of copyright of one by the other.

Patents protect inventions, i.e., technological improvements which contain an element of inventiveness over what is previously known in the particular field. A patent is granted by a state or regional patent office after detailed and lengthy examination of its validity and gives the holder monopoly protection for a maximum of 20 years from the date of application. Being monopoly protection the holder can prevent all others (even independent devisors of the same idea anywhere in the world) from using the invention for the duration of the patent. Because of the immense powers afforded to the patent holder over others, stringent tests have to be passed before patent protection will be granted.

Trade Marks / Trade Names A trade mark is a badge of identification, identifying the owner of the mark with his product or business. Rights are conferred either because the mark has been registered and/or because of the reputation of the owner which has been built up attached to the mark. A mark itself will not prevent a competitor from entering the market with his own products or services but will prevent him from annexing the mark to enable him to enter the market in the first place. A trade mark will exist indefinitely provided it continues to be used and so its owner's reputation is sustained and in the case of a mark that is registered provided the registry rules concerning usage and fee renewal are met. It is a criminal offence to claim that a trade mark is registered when it is not. A registered trade mark can be denoted by the symbol ®.

Trade Secrets and Confidential Information These are treated as a quasi property right. Rights over stories, pictures, ideas, secret business information, technical know-how, ideas for new products and markets, commercial information about customers, finance, employment, etc. may be treated as confidential information. English law does not distinguish between types of information that may be protected against a breach of confidence. There are 3 elements to be met to mount an action for breach of confidence.

- (i) The information itself must have the necessary quality of confidence about it.
- (ii) The information must have been imparted in circumstances importing an obligation of confidence.
- (iii) There must be an unauthorised use of that information, possibly to the detriment of the party communicating it.

Registered Designs The registered designs system gives the owners of the designs monopoly protection (since the 1988 Act of 25 years). It protects "features of shape, configuration, pattern or ornament applied to any article by an industrial process, being features in which the finished articles appeal to and are judged by the eye". They must be novel or original designs. The designs which are registered must be applied industrially to articles (i.e. 50 or more articles must be produced). Designs for children's toys, furniture and packaging designs are often protected as registered designs (although since the Trade Marks Act 1994 the shape of objects can be registered as trade marks).

Design Right Prior to the 1988 Act, industrial designs could be protected by copyright. The 1988 Act introduces a new Design Right for original industrial designs. It arises automatically once the design is in a tangible form and lasts for 10 years from first marketing with an overall limit of 15 years from first creation. Certain designs are excluded from the Design Right protection, namely designs for articles which either "must fit" or "must match" another article, for example, in spare parts. The owner of a Design Right must grant "licences of right" on application for an agreed fee after five years.

Passing Off is the name of the legal action which can be brought to protect the goodwill, i.e. business reputation of a business or person. This law can provide a remedy where infringement of copyright cannot be established. The three elements¹⁷ are

- (i) The Claimant must establish his goodwill in his goods, name or mark in the mind of the purchasing public
- (ii) The Claimant must demonstrate a misrepresentation (or deception) by the Defendant to the public, intentionally or otherwise, leading or likely to lead the public to believe that the goods and services offered by him are those of the Claimant
- (iii) The Claimant must demonstrate he has suffered or is likely to suffer damage as a result.

In recent years the courts have recognised that the Claimant no longer has to prove a common field of activity to decide whether there is an actionable case for passing off. In *Irvine v Talksport Ltd* [2002] EMLR 32 the Formula One driver brought a claim for damages in passing off after the radio station issued a brochure to potential advertisers showing a manipulated photograph of him holding a portable radio on which the words "Talk Radio" had been superimposed. Talk Radio argued that the brochure would not lead the public to think that Irvine had endorsed its business or that there was some other commercial arrangement between them. The trial judge and the Court of Appeal decided that there had been passing off. The amount of damages was the sum Irvine would have charged for a licence to use his image. In general, celebrities have to show that their image is recognised by the public as distinctive specifically of goods or services connected with him or her.

¹⁷ *Reckitt Coleman Products Ltd v Borden Inc* [1992] 1WLR 491 HL

Domain Names and Passing Off In recent years cyber squatting cases have arisen, the first of which was 'One in a Million'¹⁸. In this case the Defendant had registered, without permission, the names of well known enterprises including Sainsburys, Marks and Spencer and Ladbrokes, and put them up for sale. The Court found that the main purpose of the registrations was to prevent registration by the proper owners of the goodwill in those names and was to extract money from the proper owner.

APPENDIX B

Employed or Self-employed

The key question to consider in determining whether the journalist is the first owner of copyright in a work is: Is the person employed or self-employed? There is no precise and conclusive definition of an employee other than they should work under a contract of employment. Therefore, various legal tests have been devised by the courts to assist in deciding the issue. The courts apply a "multiple test". This involves consideration of all the relevant factors, principally:

- The degree of control exercised by the employer over the worker.
- The extent to which the worker is part and parcel of the employer's organisation.
- The extent to which the worker is obliged to carry out the job personally or whether he can substitute another in his place.
- The degree of financial risk carried by the worker. If someone is paid a commission rather than a salary he is more likely to be considered self-employed.
- The intentions of the parties.
- The existence of a mutuality of obligation between the parties, that is, was the employer obliged to provide work and the worker obliged to perform it? If so, this is a strong indication of an employment relationship.
- Miscellaneous factors such as customs in a particular trade or field.

In the case of journalists working as casuals, there are special problems in determining their employment status because casuals are by their nature hired in accordance with the demand for work. Traditionally, the workers are free to decide whether to take the work and may work elsewhere while the employer is under no obligation to hire. Accordingly, one essential ingredient of employment is missing, namely the mutuality of obligation, even if in all other respects the relationship would appear to have the characteristics of an employment contract.

¹⁸ British Telecommunications plc, Virgin Enterprises Ltd and others v One in Million Ltd [1999] 1WLR 9

In most cases, therefore, casuals will be held not to be employees because of the lack of mutuality of obligation and even though the economic reality of the situation means that few casual workers would in practice refuse an offer of work.

Casuals may be able to show that they are employees if they can point to the existence of a "global" or "umbrella" contract of employment. This will be implied by the courts where the relationship between the parties was of such a long standing nature that, even though the work was carried out on a casual basis, the substance of the relationship was that the employer was under a continuing obligation to provide work and the worker obliged to perform it.

If casuals are found not to be employees they retain copyright of their work.

APPENDIX C

Moral Rights

These were introduced into English law in the 1988 Act. The two primary moral rights are:

- The right to claim authorship of a work e.g. by being named as the author – the paternity right.
- The right to object to distortions of a work which are prejudicial to the author's honour or reputation – the integrity right.

Exclusions of Moral Rights

The two main moral rights do not apply to journalists. In the Act it is phrased that these rights do not apply to:

- Computer programs.
- Works produced for publication in newspapers, magazines, encyclopaedias, dictionaries or works of reference.
- Work produced for the purpose of reporting current events.

For moral rights to exist there must first be copyright in the work, although the moral rights and copyright are separate rights. However, the owner of the copyright does not necessarily have to be the owner of the moral rights.

Moral rights apply to authors of literary, artistic, dramatic, and musical works.¹⁹ Usually when a work is first created the moral rights vest in the same person, the owner.

The main exception to this rule is where the work is produced in the course of

¹⁹ Section 77 of the 1988 Act

employment (not by a self-employed person) in which case the copyright vests in the employer and the moral rights vest in the author (the employee). However, the employee cannot enforce his moral rights against a third party in respect of acts done with the authority of the owner of the copyright, his employer. There is a limited exception to this rule: where an employee author has been identified in the work and no disclaimer sufficient to dissociate the employee author from the distortions in the work has been given, he may enforce his integrity right even against the copyright owner.

Paternity

The paternity right only applies in certain circumstances and it will only be infringed where the author or photographer (or director of a film) has **asserted** that right. It applies where:

- His work is published commercially.
- His work is shown, played, or communicated to the public.
- Copies of films, sound recordings, etc. including the work are issued or shown in public.
- The events in the above occur in relation to an adaptation of the work.

The assertion of the paternity right must be a positive act and the mere appearance of the author's name on the work generally is not enough (See how to assert moral rights later).

Integrity

This gives the author the right not to have his work subject to derogatory treatment. The word "treatment" is defined as any addition, deletion, distortion or adaptation of the work other than a translation or some musical arrangement.

The right of integrity may be enforced by seeking a court injunction to prevent the exploitation of a work the author considers lowers his reputation because it has been tampered with or he may seek damages because of the harm his reputation may have suffered or may in the future suffer. However, an employee author will not be able to object to the inclusion of his full work, with the copyright owner's permission, in a compilation of works with which the author would not wish to be associated.

Assignment and Waiver of Moral Rights

Moral rights are personal to the author. They cannot be assigned and so they do not pass when copyright is sold but they can be waived. The Act states that any waiver must be in writing signed by the person giving up the right but it does not exclude the operation of the general law of contract and estoppel in relation to informal waiver. This means that if the author does not raise any objections to the copyright owner the court may decide that he has waived those rights even though

it has not been made in writing. The prudent course is, therefore, for the author always to make clear, **in writing**, his intentions as to waiver with the copyright owner or publisher.

Other Moral Rights

False attribution: Journalists, photographers, authors and directors have the right not to have works publicly but falsely attributed to them. The right also applies where a literary, dramatic or musical work is falsely represented as an adaptation of the author's work or where an artistic work is falsely represented as a genuine copy made by the author (e.g. a limited edition print).

Right to privacy in photographs and films: People who have commissioned a photograph or film for private domestic use have the right to prevent publication of the film or photograph even though the photographer or cameraman will own the copyright.

How to assert moral rights

Although for journalists a large percentage of your work is excluded from the moral rights if your work is not so excluded, e.g. it is a novel which is not produced in order to report current events or it is not a work of reference or is not written for a newspaper or magazine then in order to rely on your moral rights you must assert them in a particular way. The assertion must be made in writing. The following are examples of how an assertion may be made and they generally appear at the beginning of a literary work e.g. in the first pages of a book together with the copyright notice:

©(Name of the author) (Year of Publication)

"The moral rights of the author have been asserted".

"The rights of Mr Jones to be identified as the author have been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988".

APPENDIX D

Infringement in Depth

There are two kinds of infringer.

A Primary Infringer will himself have committed the infringement or authorised someone else to do so.

A Secondary Infringer is someone who deals commercially with infringing copies. A person is liable if, without the consent of the copyright owner, he possesses in the course of business, sells or lets for hire or offers for sale or hire an article *which he knows or has reason to believe* is an infringing copy of a copyright work. The usual sanctions are available against secondary infringers.

Primary infringers are liable even if they are neither aware nor had reason to believe that they were infringing the work. Whilst a person may be liable for primary infringement of copyright without being aware that he was committing an infringing act he will not have to pay damages but the other forms of relief (described earlier in the Guide) which are available to the copyright owner can be used against him.

There are different ways in which copyright can be infringed depending on whether the copyright work is literary, artistic or dramatic.

Direct or Indirect Copying

The Act states that infringement of copyright can take place either directly or indirectly²⁰. The following are examples of indirect copying:

- If a person takes a photograph of a painting and the photograph is subsequently copied and sold commercially then the artistic copyright in the painting has been infringed as well as that in the photograph. By contrast, a direct copy would be the artist who copied the painting using oils to produce a forgery.
- If a film is made based on a novel and a pirate copy of the film is made there will be indirect infringement of the novel as well as direct infringement of the film's copyright.

Adaptations

The copyright owner has the exclusive right to make adaptations. This is precisely defined in the Act as:

- A version of the work in which the story or the action is converted wholly or mainly by means of pictures in a form suitable for reproduction in a book, newspaper or journal.²¹
- A translation of the work.
- A version of a dramatic work which is converted into a non-dramatic form or vice versa.

Journalists may be concerned with translations. A translation without permission from the copyright owner is an infringement. In relation to a computer program a

"translation" includes a version of the program in which it is conveyed into or out of a computer language or code other than incidentally whilst running the program.²²

APPENDIX E

Privacy and the Human Rights Act

In recent years the laws of confidentiality have been in the news as they have centred on celebrities who have looked for ways to protect their privacy under English law e.g. Michael Douglas and Catherine Zeta-Jones & Another - v - Hello Ltd and others [2003] EWHC 786 (Ch); Naomi Campbell - v - Mirror Group Newspapers [2003] 1 All ER 224; Max Rufus Mosley - v - the United Kingdom - 48009/08[2002] ECHR 1840 (22 October 2009).

There is no right to privacy in English statute but the privacy of the individual has developed through case law based on the laws of confidential information. To a great extent this has been overtaken by the incorporation of the European Convention on Human Rights into English law in October 2000. Article 8 of the Convention states that:

"Everyone has the right to respect for his private and family life, his home and his correspondence".

In the case regarding photographs of Princess Caroline of Monaco²³ taken by paparazzi published in the German tabloids demonstrates a move towards privacy protection. The European Court of Human Rights held that the decisive factor in balancing the need to protect privacy against freedom of information should lie in "the contribution that the published photos and articles made to the debate of general interest". If there is no legitimate public interest the rights to a degree of privacy should apply. The English courts are obliged to give effect to this ruling and celebrities have been asking photographers to respect their wishes not to have photos taken at every opportunity.

In the case brought by JK Rowling²⁴ regarding photographs taken of her child, the judge summarised the relevant factors the court is likely to take into account in assessing whether a person's privacy has been infringed.

"The attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or inferred, the effect on the claimant and the circumstances in which and the purposes for which the

²⁰ Section 16(3)(b) of the 1988 Act

²¹ Section 16(1)(e) of the 1988 Act

²² Section 21(3)(a) of the 1988 Act

²³ Von Hannover - v - Germany 5932/00 [2004] ECHR 294

²⁴ Murray - v - Big Pictures (UK) Limited [2008] EWCA Civ 446

information came into the hands of the publishers”.

To reduce the chance of facing problems of this kind, it is advisable to obtain the consent of the subject of the photo either before taking it – e.g. a signed model release form, or before publication.

APPENDIX F

The Digital Economy Act 2010

The new Act's reach is broad: to support artists' copyright, tackle internet piracy, overhaul the broadcasting industry and start the process for radio to switch from analogue to digital. It has been steeped in controversy because it was rushed through Parliament in the final days of the Labour Government in 2010 without adequate time for serious scrutiny and debate.

Measures included in the Act

- New duties for Ofcom to report, every three years, on the UK's communications infrastructure, internet domain name registration and how media content contributes to the public service objectives (sections 1 and 2)
- Obligations on internet service providers (ISPs) aimed at the reduction of online infringement of copyright (sections 3-16)
- Power for the Secretary of State to obtain a court order to block an internet location that is being used in connection with copyright infringement (sections 17-18)
- Powers of intervention in relation to internet domain registries (sections 19-21)
- Provisions and changes in licensing for television and radio, mobile phones and video games (sections 22-41)

The Notification System and Sanctions

When an allegation of copyright infringement occurs, copyright holders can notify Internet Service Providers (ISPs). The ISP must then notify its subscriber of the alleged breach. Ofcom can order the ISP to punish the accused with speed blocks, bandwidth shaping, site blocking, account suspension or other limits. Copyright holders could potentially oblige an ISP to block access to an entire website rather than simply blocking access to or removing the infringing content. There is no provision for how and when an ISP can be required to unblock a site.

If an ISP fails to apply measures against accused subscribers, it can be fined up to £250,000.

The Act does not appear to be “future-proof” as new technology for copiers or file sharers to evade detection becomes available. Also, Ofcom is required to produce codes of practice and these are still in a consultation stage.

Powers in Relation to Internet Domain Names

Section 19 of the Act (section 124N of the Communications Act), provides that the Secretary of State can intervene in the operation of domain name registries where:

- There has been misuse of domain names, or the use of unfair practices by registries, registrars and end-users of domain names, or where registries have failed adequately to deal with complaints according to prescribed requirements.
- The above failures have adversely affected, or are likely to adversely affect:
 - a) the reputation or availability of electronic communications services or networks in the UK; or
 - b) the interests of UK consumers or members of the public

Examples of misuse of domain names include registering intentionally misleading domain names and spamming. Unfair practices would be cybersquatting, drop-catching and pressure sales tactics.

The powers are only exercisable in relation to top and second-level domain name registries where the domain is UK-related. The Secretary of State must notify the registry stating the failure and the time in which the registry has to make representations. When the time has elapsed the Secretary of State has powers to appoint a manager of the registry or to apply to court to intervene in relation to the registry's constitution so that it remedies the failures.

Orphan Works (works of unknown authorship)

After representations by many media groups including the BAJ over concerns among photographers that these proposals would be abused by the unscrupulous, they were DROPPED by the legislators.

Increased penalties for copyright infringement

Section 42 of the Act increases the maximum fine that may be imposed for dealing with copyright infringing articles and recordings to £50,000 by amending the relevant sections in the CDPA (sections 206 and 198 respectively).

Public lending right

Section 43 of the Act updates the Public Lending Right Act 1979 to reflect the changing nature of book publishing and the increasing demand for the loan of books from public libraries in formats other than print. It updates, amends and extends definitions of words in the 1979 Act such as “book”, “author” and “lending”.

Update

Two of the UK's largest internet service providers, BT and TalkTalk, have applied to the High Court seeking a judicial review of the Digital Economy Act. They believe that the sections introduced to prevent online copyright infringement were not examined thoroughly enough and may not be compatible with European law.

The outcome of the application for judicial review has not been determined as we go to press.

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